



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

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Application of Etheric Communications, LLC for a  
Certificate of Public Convenience and Necessity to  
Provide Full Facilities-Based and Resold  
Competitive Local Exchange and Non-Dominant  
Interexchange Service and Designation as an  
Eligible Telecommunications Carrier in California

Application 21-01-002

**ETHERIC COMMUNICATIONS, LLC (U 7401 C)  
APPLICATION FOR PARTIAL REHEARING OF DECISION  
22-12-026 DENYING DESIGNATION AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER**

iCommLaw  
Anita Taff-Rice  
1547 Palos Verdes #298  
Walnut Creek, CA 94597  
Phone: (415) 699-7885  
Fax: (925) 274-0988  
Email: [anita@icommlaw.com](mailto:anita@icommlaw.com)  
*Counsel for Etheric Communications, LLC*

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Pursuant to Rule 16.1 of the Commission’s Rules of Practice and Procedure, Etheric Communications, LLC (“Etheric”) hereby files this Application seeking partial rehearing of Decision No. 22-12-026 denying Etheric’s request for designation as an Eligible Telecommunications Carrier (“ETC”).<sup>1</sup> Etheric’s Application for Partial Rehearing (“Application”) identifies factual and legal errors in D.22-12-026 and Etheric requests that the Commission grant rehearing to correct them. Among the errors, D.22-12-026 denies Etheric’s motion to file under seal six documents that contain highly sensitive financial and technical network configuration information, even though the Commission routinely grants confidential treatment for such documents. Further, the Decision denies Etheric ETC designation despite the lack of any evidence contradicting Etheric’s affirmative showing that it is financially and technically qualified to operate as an ETC. Further, D.22-12-026 relies on extra-record evidence in reaching negative conclusions about the fixed wireless portion of Etheric’s network design for its Rural Digital Opportunity Fund (“RDOF”) project. The Decision also rejects Etheric’s cost estimates for the RDOF project despite the fact that Etheric’s cost projections are consistent with the Commission’s own cost projections for fixed wireless projects. Finally, the public interest analysis in D.22-12-026 does not take into account the important environmental benefits of Etheric’s proposed network, which includes substantial investment in green technology, or the immediate need of Californians without reliable broadband. For all of these reasons, and others set forth below, Etheric requests that the Commission grant rehearing to correct the factual and legal errors underlying the decision in D.22-12-026 to deny Etheric’s ETC application.

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<sup>1</sup> Rule 16.1 of the Commission’s Rules of Practice and Procedure permit applications for rehearing to be filed within 30 days of the date of issuance of a Commission order or decision. D.22-12-026 was issued on December 16, 2022. The 30<sup>th</sup> day thereafter was January 15, 2023, but that day was a Sunday. The following day, January 16, 2023 was a federal holiday. Therefore, under Rule 1.15, the deadline rolls forward to the next business day, January 17, 2023. Thus this Application for Partial Rehearing is timely.

## **I. INTRODUCTION AND BACKGROUND**

Etheric provided a voluminous record demonstrating that it meets all of the eligibility criteria for ETC designation. No party submitted contradictory evidence. Etheric's application was unopposed. Yet D.22-12-026 denies Etheric's ETC designation application despite finding that Etheric is fully qualified from a management, financial and technical perspective to operate as a telecommunications carrier in California. Thus, D.22-12-026 necessarily disregarded and/or misinterpreted critical portions of the record in denying Etheric's ETC designation request.

The Scoping ruling, issued 18 months ago concluded that "There are no issues of material disputed fact" and determined that a hearing was not necessary.<sup>2</sup> No revised Scoping Ruling has been issued finding otherwise. Not until a proposed decision was issued on September 12, 2022 recommending denial of Etheric's ETC designation request was there even a suggestion that there was a dispute about Etheric's qualifications to operate as an ETC.

Etheric submitted hundreds of pages of financial, technical and operational data into the record demonstrating that it is qualified to operate as an ETC and to carry out its RDOF award. Etheric has made a substantial demonstration that its RDOF award will serve the public interest by providing broadband in chronically unserved areas in California within the next two years. Denying Etheric's ETC application deprived these underserved Californians of \$248 million in federal broadband funding. Governor Newsom has announced that state funding for broadband is being cut due to budget shortfalls.<sup>3</sup> D.22-12-026 errs legally and factually in concluding that denying Etheric's ETC application protects the public interest.

Because the basis the proposed denial of ETC designation appeared inconsistent with the evidentiary record and the Commission's public interest standard, Etheric filed a motion requesting a

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<sup>2</sup> Assigned Commissioner's Scoping Memo and Ruling, at p. 3 (Apr. 7. 2021).

<sup>3</sup> California State Budget for 2023-2024 issued by Governor Gavin Newsom on January 10, 2023.

hearing so that it could determine the basis for the Commission's proposed ETC denial. D.22-12-026 does not address the merits of this motion. Rather, it includes a boilerplate denial of all pending motions with no explanation as to why Etheric was not entitled to a hearing to identify whether any evidence exists that contradicts its extensive showing that it meets the criteria to operate as an ETC. Therefore, Etheric reluctantly files this application for rehearing to ensure a full and fair consideration of Etheric's qualifications to operate as an ETC in California.

## **II. LEGAL STANDARDS**

### **A. Requirements for Applications for Rehearing**

The purpose of an application for rehearing is to alert the Commission to legal or factual errors in a decision and to allow the Commission to correct the errors expeditiously.<sup>4</sup> The Commission is bound by certain principles in issuing decisions. It is required to make decisions based on the record in the proceeding.<sup>5</sup> The Commission must not act in an arbitrary and capricious manner, and it must proceed in a manner required by law, including the California Constitution.<sup>6</sup> Further, the Commission must apply its rules and laws to all parties in a non-discriminatory manner.<sup>7</sup>

### **B. Commission Decisions Must be Based on the Entire Record**

Under state law, Commission decisions must be based on the entire record in the proceeding.<sup>8</sup> Further, any Commission conclusions must be supported by factual findings based on evidence.<sup>9</sup> A clear record is required on every issue in a Resolution, and ambiguity as to the basis for any decision set forth in a Commission decision is grounds for rehearing, as the Commission recognized in D.10-

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<sup>4</sup> Rule 16.1(c) of the Commission's Rules of Practice and Procedure.

<sup>5</sup> Commission Rule of Practice and Procedure 8.3(k).

<sup>6</sup> Cal. Pub. Util. Code Section 1757.1(a).

<sup>7</sup> Cal Const, Art. I § 7.

<sup>8</sup> Cal. Pub. Util. Code Section 1757.1(a)(4); see also Commission Rules of Practice and Procedure Rule 8.3(k).

<sup>9</sup> Cal. Pub. Util. Section 1757.1(a)(4).

05-052.<sup>10</sup> Based on concerns that the Commission may have overlooked or misinterpreted the voluminous record in this proceeding, Etheric asks for rehearing.

### **C. Etheric Met its Burden of Proof**

This is a ratesetting proceeding.<sup>11</sup> The evidentiary standard in a ratesetting matter is preponderance of the evidence.<sup>12</sup> Preponderance of the evidence is defined “in terms of probability of truth, *e.g.*, ‘such evidence, when weighed with that opposed to it, has more convincing force and the greater probability of truth’.”<sup>13</sup> In this case, no evidence opposing Etheric’s affirmative case was submitted into the record. Therefore, Etheric necessarily met its burden of proof to demonstrate that it meets the requirements to be designated as an ETC. Rehearing should be granted so that the Commission can review the entire record and modify D.22-12-026 to grant Etheric’s ETC designation request.

### **D. Commission Must Provide Due Process in Rendering Decisions**

Although the Commission asserts that it has broad discretion in decision making, its processes must comply with state law, including due process requirements. The Commission may not abuse its discretion, it must proceed in a manner required by law, and it must not apply its orders or regulations or state law in a discriminatory manner.<sup>14</sup> D.22-12-1026 is not consistent with due process requirements because it overlooks or misinterpret material relevant record evidence. and is inconsistent with federal rules and orders. Further, material substantial changes were made in a second revised version of the draft resolution two days before the Commission vote, which is not

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<sup>10</sup> D.10-05-052, 2010 Cal. PUC LEXIS 187 (Cal. P.U.C. May 20, 2010), at \*17 (the Commission granted rehearing on an executive compensation issue in an informal rate case proceeding because there was ambiguity as to the basis for that portion of the decision).

<sup>11</sup> Resolution ALJ 176-3473 and Scoping Memo.

<sup>12</sup> See D16-12-063, at 9, *citing* D.12-12-030, at 44.

<sup>13</sup> D.12-12-030, at 42, *aff’d* D.15-07-044, at 28-30.

<sup>14</sup> Cal. Pub. Util. Code Section 1757.1(a)(1) and (a)(2).

compliant with the Commission's own governance policies. This deprived Etheric of any meaningful opportunity to be heard because the second revised draft was issued during the "quiet period" preceding the Commission's public agenda meeting.

The process required for an administrative agency to reach a legal decision has been well settled for more than 80 years. In *Saginaw Broadcasting v. FCC*,<sup>15</sup> the U.S. Court of Appeals for the D.C. Circuit set forth a four-part test by which agency decisions must be evaluated: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of fact of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion.<sup>16</sup> Thus the court made clear that an agency is required to base its decision on facts in the record upon which the ultimate findings of fact and conclusions must rely. The Commission did not do this in Resolution T-17763.

The *Saginaw* court made clear that "a mere conclusion" is not sufficient; rather an agency decision must include findings that are "specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it."<sup>17</sup> Without such basis, an agency order is void.<sup>18</sup> The holdings in *Saginaw* are clearly binding on the Commission.

The California Supreme Court applied the *Saginaw* holding in reviewing a Commission decision and invalidated that decision for failing to set forth the facts upon which the decision was

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<sup>15</sup> 96 F.2d 554, 559 (D.C. Cir. 1938), cert den. sub. nom *Gross v. Saginaw Broadcasting Co.* 305 U.S. 613 (1938).

<sup>16</sup> *Id.*, at 559.

<sup>17</sup> *Id.*, at 561.

<sup>18</sup> *Id.*, at 561.



based.<sup>19</sup> The California Supreme Court held that “[e]very issue that must be resolved to reach that ultimate finding is material to the order or decision.”<sup>20</sup> The California Supreme Court held that the Commission must state the material issues of fact and law that determine the ultimate issue<sup>21</sup> not only to avoid arbitrary and capricious decisions, but to enable a party to pursue an appeal.<sup>22</sup>

### **III. D.22-12-026 IS BASED ON MATERIAL FACTUAL ERROR**

#### **A. D.22-12-026 Incorrectly Denied Confidential Treatment for Financial and Network Configuration Documents**

D.22-12-016 denied Etheric’s motion to seal six exhibits attached to its Comments on the initial proposed decision (Exhibits B, C, F, H, I and J). The basis for the denial was that the exhibits were provided after the record was closed and the matter submitted, and that the exhibits were stricken from the record.<sup>23</sup> Etheric respectfully submits that this holding is incorrect.

On November 2, 2022, Administrative Law Judge Miles granted Etheric’s Motion to Reopen the Record and admitted a number of documents, including all of the confidential exhibits to Etheric’s Comments. The ruling stated, “I grant Etheric’s Motion to reopen the record in this proceeding for the sole purpose of receiving into the record correspondence Etheric received from the FCC, as well as other documents that Etheric tendered to the Commission prior to the date of this ruling.”<sup>24</sup> Etheric’s Comments on the proposed decision were filed on October 3, 2022, thus they were covered by ALJ Miles’ ruling and were admitted into the record. Thus, the finding in D.22-12-026 that confidential treatment would be denied because the six documents were not admitted to the record and/or stricken, is incorrect.

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<sup>19</sup> *California Motor Transport Co. v. Public Utilities Comm’n.*, 59 Cal.2d 270, 275 (1963).

<sup>20</sup> *Id.*, at 273.

<sup>21</sup> *Id.*, at 275.

<sup>22</sup> *Id.*, at 274.

<sup>23</sup> D.22-12-026, at p. 32.

<sup>24</sup> Administrative Law Judge’s Ruling Granting Motion to Reopen the Record, at p. 2 (Nov. 2, 2022).

The six exhibits attached to Etheric's Comments consist of highly sensitive financial (Exhibits C and J) and technical network information (Exhibits B, F, H and I). Both categories of information qualify for confidential treatment under General Order 66-D. As discussed below, all of the materials for which Etheric requests confidential treatment qualify for exemptions from public disclosure under state or federal law. The Commission routinely seals such information. Indeed, the Commission granted Etheric's motion to seal exactly the same type of financial and technical documents submitted in support of the CPCN portion of its application.<sup>25</sup> The Commission held:

Etheric represents that the information in each of the exhibits [submitted with its CPCN application and an April supplement] is sensitive, and disclosure could place Etheric at an unfair business disadvantage. Having reviewed the exhibits, we agree that this material should be kept confidential for three years after the date of this decision and grant the request for that period.

Cal. Pub. Util. Code Section 6254(k) exempts records, the disclosure of which is exempted or prohibited pursuant to federal or state law. Etheric's financial and network configuration information is highly confidential and propriety and meets the definition of trade secret information as defined in Cal. Civ. Code 3426.1.<sup>26</sup> Trade secret information is exempt from disclosure. The disclosure of such financial and network configuration information would put Etheric at a competitive disadvantage, and there is no recognizable public interest served by the disclosure of this information. In addition, network configuration information is exempt from disclosure pursuant to 6 U.S.C. Section 133(a)(1)(E), which protects from public disclosure, information regarding the location, function, and relationship between network facilities, including the identity of critical infrastructure.

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<sup>25</sup> D.22-12-026, at p. 33.

<sup>26</sup> Cal Civ Code § 3426.1 (d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and  
Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Etheric is a privately-held corporation and, as such, its financial and network configuration documents are confidential and not publicly available. Further, Etheric is not under any fiduciary obligation to prepare or release financial statements to the public. The disclosure of Etheric's financial information could provide competitors with valuable insight into the financial structure of Etheric and its financing activities. Due to the highly confidential and strictly proprietary nature of the company's financial statements, the disclosure of which could result in direct and immediate harm to the competitive position of Etheric, there exists a genuine need for Etheric to keep this information private.

Release of Etheric's network configuration information would disadvantage Etheric by giving its competitors insight into technical solutions, engineering techniques and other sensitive technical trade secrets. Disclosure of technical network information could also expose Etheric's network to security risks. Further, release of network configuration information would substantially harm Etheric's ability to negotiate with vendors, incumbent local exchange carriers, and other local and interexchange carriers for services and equipment. Etheric is requesting confidential treatment only to the extent necessary to protect its competitively sensitive information.

**B. The Decision Does Not Take Account of Record Evidence Demonstrating that Etheric Has Sufficient Financial Capabilities to Complete the RDOF Project**

Regardless of the Commission's view of Etheric's qualifications to operate an ETC in California, Etheric respectfully requests that the Commission not seriously disadvantage Etheric in the marketplace by declining to protect its highly sensitive trade secret materials. Etheric therefore requests that Commission correct the holding denying Etheric's motion to seal confidential Exhibits B, C, F, H, I and J attached to its Comments on the Proposed Decision filed on October 3, 2022. To the extent such correction may be made without the need to grant rehearing, Etheric requests such

correction. D.22-12-026 concludes that “Etheric is not financially capable of building a network capable of providing voice and gigabit speed broadband.”<sup>27</sup> The entire discussion is set forth in a single paragraph and provides no details or citation to record evidence contradicting Etheric’s detailed financial model submitted to the Commission in support of its ETC application.

Etheric submitted documentation demonstrating that it can build a hybrid fiber/fixed wireless network for the \$248 million RDOF award. Yet D.22-12-026 dismissed Etheric’s detailed cost model and instead assumes there will be a shortfall between the RDOF award and the actual cost of the project.<sup>28</sup> This conclusion disregards that Etheric’s cost projections are completely consistent with the Commission’s findings in D.22-11-013 establishing a reasonable per household cost for fixed wireless projects. Etheric’s cost projection is slightly less than the \$4,500 per household figure established in D.22-11-013. Thus the Commission’s own expertise on fixed wireless project costs confirms the validity of Etheric’s financial cost model. Etheric realizes that the Commission did not take account of D.22-11-013 because it was issued so close in time to the December 15, 2022 vote on D.22-12-026.<sup>29</sup> Therefore, Etheric seeks rehearing so that Commission can correct its error finding that Etheric is not financially qualified to operate as an ETC and to carry out the RDOF project.

D.22-12-026 is also critical of Etheric’s submission of its access to capital from Summit Partners. D.22-12-026 finds that a commitment letter from Summit is not sufficiently concrete because it includes a standard disclaimer. Etheric explained that due to the passage of time, Summit would need to review its underwriting documents before executing a final financing document<sup>30</sup> but

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<sup>27</sup> Decision 22-10-026, at p. 21.

<sup>28</sup> Exhibit J, Etheric FCC Financial Model 10-29-21, Etheric Comments on PD filed October 03, 2022; Etheric FCC Long-form application provided via Kiteworks.

<sup>29</sup> Etheric filed a motion November 30, 2022 asking the Commission to take official notice of D. 22-11-013 and to analyze Etheric’s cost projections based on the standard reasonable per household cost for fixed wireless it established.

<sup>30</sup> Ex Parte Communications of Etheric Communications, LLC, at p.3 (November 28, 2022).

that Summit had allocated a large sum of money for Etheric. Etheric notes that the issue of additional capital from Summit is a moot point because the record shows that its cost projections are valid based on the standard per household cost established in D.22-11-013.

**C. Decision 22-10-026 Asserts Without Record Evidence That Etheric May Not Be Able to Scale Its Existing Operations to Carry Out the RDOF Project**

The Decision finds that “Etheric is not operationally capable of scaling its business to build a network capable of providing voice and gigabit-capable service in 64,463 locations.”<sup>31</sup> The only reasons offered for this conclusion are that Etheric currently operates in nine counties and would expand to 25 counties once the RDOF project is completed.<sup>32</sup> On this basis, the Decision concludes without providing any detail or explanation that “this scale of increase is not feasible.”<sup>33</sup> D.22-12-016 does not point to single instance in which Etheric has been unable to scale to meet new customer demand or to serve new service areas. Etheric notes that scope of expansion is not one of the Commission’s or FCC ETC eligibility criteria.<sup>34</sup> Thus, the view that Etheric might be unable to successfully complete the RDOF project appears to be based on generic concerns rather than specific problems with Etheric’s performance over 20 years in California.

D.22-12-206 errs legally because it does not take account of the extremely low bar to entry for 40 percent of Etheric’s RDOF locations that are contiguous with, or very nearby, its existing network. Thus Etheric can readily leverage its existing fiber backbone and wireless facilities for the RDOF service area to expedite deployment and reduce costs.<sup>35</sup> The Decision asserts that the Commission could not verify that 40 percent of the RDOF area is adjacent to or nearby Etheric’s existing network,

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<sup>31</sup> Decision 22-10-026, at p. 22.

<sup>32</sup> Decision 22-10-026, at p. 21.

<sup>33</sup> Decision 22-10-026, at p. 21.

<sup>34</sup> See discussion below.

<sup>35</sup> Decision 22-12-026, at p. 21

but it provide no explanation of any validation difficulties. Etheric provided a map of its existing network and showed the adjacent or close-by RDOF areas. Etheric respectfully requests that rehearing be granted so that it can assist the Commission in reviewing the map. D.22-12-026 also provides no analysis of explanation demonstrating the why it is infeasible for Etheric to expand its existing network to adjacent counties over the six-year period allowed under RDOF. The Decision further errs by dismissing evidence that Etheric has retained Tilson Technology Management, Inc., which has a team of 700 engineers, permitting and licensing specialists, construction crews, and field engineers to supplement Etheric’s engineering and operational skills for the RDOF project.<sup>36</sup>

Finally, the Decision correctly notes that “most of Etheric’s proposed buildout would be in rural counties,”<sup>37</sup> but implies that the RDOF buildout would be substantially different than Etheric’s existing network. This is not correct. Much of Etheric’s existing network is in rural areas.<sup>38</sup> Thus the characteristics of Etheric’s existing network and proposed RDOF project are more similar than dissimilar.

#### **D. Decision 22-10-026 Disregards Record Evidence That Fixed Wireless Technology Is Capable of Supporting Required Broadband Speeds for RDOF**

D.22-12-016 asserts that Etheric’s network plan using a hybrid fiber/fixed wireless design is not technically capable of providing gigabit speeds. It fails entirely to analyze Etheric’s actual deployment plan submitted in the record of this proceeding, and instead relies on generic assertions regarding fixed wireless. The Decision states, “Fixed wireless technology generally depends on line-of-sight.”<sup>39</sup> Etheric submitted evidence showing that it’s network plan places antennas and base

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<sup>36</sup> Etheric submitted a letter from Tilson detailing its capabilities in a CPCN/ETC supplement on May 25, 2022, in Exhibit 2.

<sup>37</sup> Decision, at p. 21

<sup>38</sup> See <https://www.broadbandmap.ca.gov>.

<sup>39</sup> D.22-12-026, at p. 25.

stations in strategic locations so that 75% of locations have direct line of sight.<sup>40</sup> D.22-12-016, however denies the entirety of Etheric’s ETC application despite having direct line of sight, which the Commission appears to view as a requirement for successful fixed wireless. An additional 11 percent of network locations use fiber and the small remainder of locations without direct line of sight have light foliage and Etheric submitted evidence that it has engineered those locations with appropriate technology to deliver broadband in light foliage. Etheric notes that D.22-12-026 provides no guidance on specific network locations where it believes the distance is too far to support the required RDOF speeds.

The Decision makes the observation that “[a]n increase in users will require significant increases in base stations and antennas, as well as adding additional access points on residential property to support the minimum required broadband speeds.”<sup>41</sup> Etheric agrees and its design fully accounts for these elements. Etheric notes that D.22-12-026 does not identify areas where the Commission believes it will be infeasible to deploy base stations or antennas or gain the necessary access to property (public or private) to deploy its equipment. Similarly, the Decision states that “building in mountainous, hilly, and forested rural areas will substantially increase the cost of the network to overcome the line-of-sight issue.”<sup>42</sup> While this may be generally correct, Etheric has designed its network to account for these issues. Thus, if rehearing is granted, Etheric feels certain it can demonstrate that it has sufficient personnel and expertise to deploy the required facilities.

Despite the Decision’s generic concerns about fixed wireless, Etheric provided record evidence that Etheric is capable of supporting speeds of 800 Mbps with fixed wireless. Etheric documented an existing deployment that supports broadband speeds over 800 Mbps in the field in

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<sup>40</sup> See Logical Network Diagram Addendum provided to the FCC as supplemental documentation and uploaded to Kiteworks on September 22, 2022.

<sup>41</sup> Decision 22-12-016, at p. 25.

<sup>42</sup> Decision 22-12-026, at p. 26.

Juan Bautista, California, an area typical of Etheric’s RDOF service area. The presentation explained how Etheric will ramp its capabilities to support 1 Gbps broadband speeds for its planned RDOF service area. The Decision ignores this evidence, thus Etheric provides a copy of the documentation on San Juan Bautista as Attachment E.

**1. Decision Overlooks Evidence that FCC Approved Fixed Wireless RDOF Networks**

The record in this proceeding has evidence that Federal Communications Commission (“FCC”) approval of the RDOF awards for Nextlink and Starry. The approved RDOF network design for both providers includes a hybrid of fiber and licensed fixed wireless technology. Nextlink’s winning bids total \$429 million, while Starry’s total \$269 million.

**2. The Decision ignores evidence that Etheric’s network design was evaluated by independent engineers on behalf of Summit**

Etheric submitted a letter from Summit Partners, its financial backer, describing the detailed vetting process that Summit underwent before allocating funds for Etheric’s RDOF project. Summit stated:

Summit has performed extensive due diligence in relation to Etheric’s financial model, its technical and engineering plan, and the feasibility of achieving the successful execution of its network infrastructure, both fiber and wireless. Summit utilizes a rigorous review process that includes not only a financial analysis of Etheric’s existing operations and RDOF business plan, but an expert analysis of the technical feasibility of the project. As you might expect, this review employs conservative assumptions and Summit does not fund projects unless there is a high degree of certainty that the business model and technical plan are sound.<sup>43</sup>

After completing its rigorous review, Summit determined that Etheric’s technical plans are sound and agreed to allocate funding through a senior secured credit facility and it has submitted statements of support from numerous entities that will benefit from the RDOF project. The Decision cites to no evidence whatsoever that contradicts Etheric’s

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<sup>43</sup> Etheric Limited CPCN/ETC supplement, at Exhibit 1 (May 25, 2022).



demonstration that it is qualified to operate as an ETC.

Rather, the basis for denial appears to be generic concerns about Etheric's ability to carry out the RDOF award, not evidence that Etheric fails to meet the FCC and Commission criteria for ETC designation. Indeed, the only reason provided for the ETC denial that is unrelated to the RDOF award is a generic finding that allowing Etheric to operate as an ETC is not in the public interest. All of the reasons provided to claim that Etheric's ETC application fails to meet the public interest are related to its specific RDOF award. Etheric is aware of no state or federal rule, regulation or order that ties ETC designation to a specific federal funding source. Thus, even if the Commission had contradictory evidence that Etheric might be unable to perform on the RDOF project, it is not just or reasonable to deny ETC designation generally.

As an example of the failure to identify any contradictory evidence that justifies denying Etheric's ETC designation, of the Decision asserts that fixed wireless technology is unsuitable because it purportedly requires line of sight.<sup>44</sup> The sole authority cited in D.22-12-026 was a study from the Benton Institute, which was not in the record and was undermined by evidence that the author of the study has actually recommended hybrid fixed wireless/fiber project in other states.<sup>45</sup> Such reliance on extra-record evidence violates Etheric's due process rights.

Reliance on the Benton Institute report is further misplaced because it is a generic assessment of fixed wireless technology, not the specific spectrum or equipment Etheric intends to use and therefore cannot fairly be viewed as contradicting Etheric's unrebutted evidence that 75% of its proposed network where it will operate as an ETC has direct line of sight to customers and that an additional 11% of its network locations will be served by fiber.<sup>46</sup> The Decision offers no evidence

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<sup>44</sup> Proposed Decision (Rev.1) p. 23 ¶1.

<sup>45</sup> Etheric Comments on Proposed Decision, at p. 11, n.59 ( <https://www.ctcnet.us/publications/state-of-georgia-analysis-of-fixed-wireless-options/>).

<sup>46</sup> Etheric comments on Proposed Decision, at p.8, n.11 (citing Etheric Long Form Application, pg. 11

that Etheric will be unable to provide broadband speeds for these customers. There is a small percentage of customers in Etheric's RDOF network design where there is light foliage, and Etheric provided un rebutted evidence that it will utilize spectrum and technology solutions fully capable of penetrating light foliage.<sup>47</sup> The Decision cites to no contrary evidence – *i.e.* an example where the exact type of spectrum and technology proposed by Etheric has failed to deliver broadband speeds.

#### **IV. D.22-12-026 IS BASED ON MATERIAL LEGAL ERROR**

##### **A. The Decision Violates Section 1757 Because It Lacks Record Support**

D.22-12-026 includes three foundational findings based on factual (“FoF”) or legal error: FoF 14 (Etheric's proposed buildout to provide voice and broadband service to 64,463 locations in line with RDOF build requirements is not feasible given the present size of the Etheric service area, its management or its operating capabilities); FoF 15 (Etheric's RDOF award of \$248,634,963 appears insufficient to construct and operate a telecommunications and broadband capable network serving up to 64,463 new locations within the state of California) and FoF 16 (Granting an ETC designation to Etheric at this time is not in the public interest). The Decision further is based on erroneous Conclusions of Law (“CoL”): CoL 14 (The Commission has authority to evaluate whether it is in the public interest to deny an ETC designation to Etheric after taking into account deficiencies within its existing financial, technical and operational expertise that would affect Etheric's ability to carry out the RDOF build); CoL 15 (Etheric's request for ETC designation should be denied).

As discussed above, the Decision disregards record evidence and reaches a conclusion contrary to the evidence in each of these FoF and CoL. This is not a case of giving some evidence more weight than others. Rather, the PD ignores or misstates documents and information without any contrary evidence. The PD therefore constitutes legal error because it fails to base its decision on the

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submitted in the record via Kiteworks).

<sup>47</sup> Etheric Comments on Proposed Decision, at p. 8.

record as required by Section 1757.1(a)(4). These factual and legal errors create a material dispute of fact that requires a hearing to resolve.<sup>48</sup>

For example, D.22-12-026 questions whether Etheric can scale its operations to carry out its proposed ETC project.<sup>49</sup> Yet it cites to *no evidence* that Etheric has ever failed to complete a project or failed to scale its operations for a new service area. The Decision questions whether Etheric can complete the project in its ETC service area for the estimated cost and speculates that “Etheric plans to customize delivery of gigabit service depending on the complexity of each location and, this need to customize delivery itself *may* result in unplanned changes and affect both performance and cost of the service.”<sup>50</sup> Yet the Decision points to *absolutely no evidence* contradicting Etheric’s cost projections.

Due process and the Commission’s own precedent require that it must base its recommendations on something more than speculation. Rather, the Commission must base its decisions on the evidentiary record, along with reasonable inferences to be drawn therefrom, and may give no weight to speculation.<sup>51</sup>

The Commission voted to deny Etheric’s ETC application despite a lack of record evidence contradicting Etheric’s voluminous case in support of its application in a non-adversarial proceeding. The Commission is required to base its decision on the record but did not do so. Further, The Commission violated Etheric’s due process rights by disregarding the record evidence, relying on

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<sup>48</sup> D.98-07-102.

<sup>49</sup> Decision 22-10-026, p. 21.

<sup>50</sup> Decision 22-10-026, p. 26 (emphasis added).

<sup>51</sup> Cal. Pub. Util. Code Section 1757.1(a); See also D.10-12-064, 2010 Cal. PUC LEXIS 437, \*10 (Cal. P.U.C. December 16, 2010) (rejecting parties’ position because “[t]here is no evidence in the record to support claimed default, . . . [t]hus, the claim was based on speculation, and contradicted by the fact.”; D. 22-05-003, at p.84 (May 5, 2022) (rejecting speculative claims of invasion of privacy, noting conditional words such as “potentially” and “might”). Etheric notes that the revised Proposed Decision uses the same speculative and conditional language, e.g. Etheric’s customized solutions for customers “may” result in changes that could affect project cost.

staff speculation and denying Etheric’s motion requesting a hearing so that the basis of the recommended denial could be examined.

### **B. The PD Relies on Evidence Not in the Record**

The generic criticism in the D.22-12-026 about fixed wireless is based on a study prepared by the Benton Institute.<sup>52</sup> The Decision states, “We are informed by a report published by the Benton Institute for Broadband & Society, “Fixed Wireless Technologies and Their Suitability for Broadband Delivery” by Andrew Afflerbach, Ph.D., P.E. CTC Technology & Energy, dated June 2022.” Such reliance is legal error because the Benton Institute report is not in the record of this proceeding, and it violates parties’ due process rights to rely on extra-record evidence.<sup>53</sup> Etheric notes that Mr. Afflerbach’s firm has recommended fixed wireless as a suitable broadband technology in Georgia and Texas.

### **C. The PD Violates Due Process by Imposing Additional Requirements Beyond Resolution T-17002**

Decision 22-12-026 further erred by denying Etheric’s ETC application based on its use of fixed wireless technology. California courts have determined that it is a violation of Cal. Pub. Util. Code Section 1751.1 for the Commission to decide an issue outside the announced scope of issues designated to be addressed in a proceeding. For example, in *Southern California Edison v. Public Utilities Commission*,<sup>54</sup> the court determined that the Commission had not proceeded in the manner required by law when it considered and acted upon a proposal that certain public utilities be required to pay prevailing wages to workers on energy-utility construction projects, because the issue of prevailing wage was not within the defined scope of the proceeding.

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<sup>52</sup> Decision 22-12-016, at p. 26, n.44.

<sup>53</sup> *Southern California Edison*, 140 Cal.App.4<sup>th</sup> 1085 (2006).

<sup>54</sup> 140 Cal. App. 4th 1085 (2006).

Exceeding the scope of allowable eligibility criteria violates due process. The California Constitution guarantees due process to citizens (including companies) in California. Cal. Const. Art. I, § 7(a) mandates that “[a] person may not be deprived of life, liberty, or property without due process of law....” While the term “due process” is not defined in the California Constitution, it is well established that, at a bare minimum, due process requires notice and an opportunity to be heard. *Londoner v. Denver*, 210 U.S. 373, 385-386 (1908); *Bi-Metallic v. State Board of Equalization* 239 U.S. 441, 445 (1915). With regard to administrative agencies, the California Supreme Court held that “[d]ue process as to the commission’s...action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made.” *People v. Western Air Lines, Inc.* 42 Cal.2d 621, 632 (1954).

#### **D. The Decision Is Inconsistent With Federal Law**

Section 214(e) of the Communications Act of 1934, as amended (“Communications Act”), establishes a dual-layer federal-state regulatory regime for ETCs. Section 214(e)(2) specifically states in relevant part that:

A State commission *shall* upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and *shall*, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1).

The referenced Section 214(e)(1) establishes two requirements for ETC designation. First, the carrier must offer the services supported by the Federal universal support mechanisms (here, RDOF) “either using its own facilities or a combination of its own facilities and resale of

another carrier's services."<sup>55</sup> Second, the carrier must "advertise the availability of such services and the charges therefor using media of general distribution."<sup>56</sup>

The Decision did not purport to deny Etheric's Application for either of these statutory bases. Rather, it stated that the Commission has broad authority to review any ETC designation request on a case-by-case basis and grant or deny such designation after considering the local circumstances particular to each application and its conclusion that it may take into account the ability of each applicant to carry out the RDOF build with its existing financial, technical, and operational expertise."<sup>57</sup> The Decision adds that "[m]oving forward with an applicant that does not meet the RDOF buildout and service requirements would potentially lock-out federal and/or state funding for census geographies for years to those that are most in need of broadband access and would not be in the public interest."<sup>58</sup>

Etheric does not dispute that Congress, in adopting Section 214 of the Communications Act, intended that the Commission can "evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, *as long as such determinations are consistent with federal and other state law*."<sup>59</sup> For example, an applicant might be disqualified for some known instance of malfeasance. This language makes plain, however, that the Commission's flexibility is not unlimited. Indeed, the FCC made clear that even though its guidelines are not binding upon the states,<sup>60</sup> states that exercise jurisdiction over ETCs should apply these requirements in a manner consistent with section 214(e)(2) of the Act."<sup>61</sup>

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<sup>55</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>56</sup> 47 U.S.C. § 214(e)(1)(B).

<sup>57</sup> Proposed Decision at 20.

<sup>58</sup> *Id.*

<sup>59</sup> *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371, 6397-98 (2005) ("*Guidelines Order*") (citation omitted) (emphasis added).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

While it may be within the statutory guidelines for the Commission to exercise “broad authority to review any ETC designation request on a case-by-case basis and grant or deny such designation after considering the local circumstances particular to each application,”<sup>62</sup> it is a separate matter entirely for the Commission to “take into account the ability of each applicant to carry out the RDOF build with its existing financial, technical, and operational expertise.”<sup>63</sup> In other words, consideration of local circumstances is contemplated by the *Guidelines Order*, but the Commission’s predictive judgment of RDOF compliance clearly is not. D.22-12-026 erred by making judgments about Etheric’s ability to comply with its RDOF obligations.

While Etheric understands that the Commission takes seriously its responsibilities in the dual state/federal partnership to administer public funding for broadband, Etheric respectfully suggests that the Commission should give the opinion of the FCC regarding a long-form applicant’s financial, technical, and operational qualifications full weight. The FCC requires auction winners to provide extensive information so it can make that determination based on its singular expertise.<sup>64</sup> To protect taxpayers’ investment, the FCC stated that “Commission staff will evaluate the information submitted in the long-form application and will rely on an eligible bank’s willingness to issue the applicant a letter of credit to determine whether an applicant is reasonably capable of meeting its Rural Digital Opportunity Fund auction obligations in the specific areas where it has winning bids.”<sup>65</sup>

The *Auction Procedures Public Notice* was carefully crafted to comply with Section 214 of the Communications Act and established a clear demarcation of responsibilities between the FCC and

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<sup>62</sup> Proposed Decision at 20.

<sup>63</sup> *Id.*

<sup>64</sup> See Public Notice, *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020; Notice and Filing Requirements and Other Procedures for Auction 904*, 35 FCC Rcd 6077, 6165-78 & Appendix A (2020) (“*Auction Procedures Public Notice*”).

<sup>65</sup> *Id.* at 6098-99 (citation omitted). The FCC defined “reasonably capable” as the FCC staff’s “reasonable expectation that the applicant can meet those obligations.” *Id.* at 6099.

state commissions. Notwithstanding this line, the Decision unlawfully cuts off the FCC’s review by substituting the Commission’s own predictive determinations, which are unconstrained by any established evaluative standards or precedent. It is not even apparent *what* standard, if any, the Commission used in drafting the Decision – it merely cites its “due diligence review”<sup>66</sup> and “broad authority to review any ETC designation request,”<sup>67</sup> and then resorts to conclusory statements about Etheric’s purported “deficiencies.”<sup>68</sup> D.22-12-026 concludes that Etheric “is not operationally capable of scaling its business”<sup>69</sup> but to the best of Etheric’s knowledge, there is no evidence in the record documenting Etheric’s inability to scale.<sup>70</sup>

**E. D.22-12-1026 Disregards Fixed Wireless Cost Standard Established in D. 22-11-013**

Decision 22-11-013, approved on Nov. 17, 2022, established that \$4,500 per household or less is a reasonable cost for fixed wireless broadband service based on “actual past project costs”.<sup>71</sup> The per-household cost is so uncontroversial that D.22-11-013 delegates authority to staff to approve CASF projects proposing such per-household cost for fixed wireless projects on a ministerial basis.

The revised Decision posits that Etheric’s cost estimates for building the RDOF network are too low. But Etheric’s estimates are in line with the “actual past project costs” for fixed wireless broadband in California. Evidence in Etheric’s cost model that was admitted into the record after the record was reopened on Nov. 4 demonstrates that Etheric’s average cost per household for the fixed wireless portion of its RDOF network is \$3,660. Etheric’s cost is somewhat lower than the Commission’s cap because it is able to leverage its existing fiber network rather than installing a new fiber backbone network for RDOF. Evidence in the record shows that 40 percent of Etheric’s RDOF

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<sup>66</sup> Decision 22-10-026 at p. 20.

<sup>67</sup> *Id.* at 30.

<sup>68</sup> *Id.* at 36.

<sup>69</sup> *Id.* at 21.

<sup>70</sup> *See Auction Procedures Public Notice* at 6151-52.

<sup>71</sup> D.22-11-013, at p. 38, Appendix A, page A-31, A-32.



service area is adjacent to or close by its existing fiber network, therefore, only radio equipment need be added to serve new customers.

Thus, Etheric's cost estimate is extremely reliable because it is substantially the same as the Commission's own cost estimate based on actual California fixed wireless projects. The revised Decision provides no reason why the Etheric's per-household cost estimate for fixed wireless would differ from the Commission's actual experience on multiple fixed wireless projects in California. Thus, in order be consistent with its own order establishing the reasonable cost for fixed wireless broadband in California, the Commission must take official notice of D.22-11-013, apply the cost estimate to Etheric's proposed RDOF project, and determine that the funding available to Etheric for the RDOF project is sufficient to cover the cost of construction.

#### **F. D.22-12-026 Improperly Denies Mandatory Request for Official Notice**

Etheric filed a motion for official notice of four documents that directly refuted findings in the Decision on issues material to the proposed denial of ETC designation for Etheric. Etheric demonstrated that it met the standard for mandatory official notice and thus the Commission lacked discretion to deny the motion. Nonetheless, D.22-12-026 denies Etheric's motion for official notice with boilerplate language that denied all pending motions without any analysis. Etheric sought official notice for the following: the NTIA's Notice of Funding Opportunity explaining how it will assess eligibility for BEAD funds, two FCC orders setting forth the standard applicable to measuring whether an RDOF recipient is supporting required broadband speeds and D.22-11-013 establishing a per se reasonable per-household cost for fixed wireless projects. The Commission erred legally by denying Etheric's motion for official notice.

## 1. Legal Standard for Taking Official Notice

Pursuant to Rule 13.10 of the Public Utilities Commission Rules of Practice and Procedure, “Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq.”<sup>72</sup> California Evidence Code § 451 titled, “Matters which must be judicially noticed,” provides in relevant part, “Judicial notice shall be taken of the following: (a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution.”<sup>73</sup>

Additionally, Section 452 provides in relevant part, “Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state[;] (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States[;] (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States[;] (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.”<sup>74</sup> “Section 452 includes matters both of law and of fact. The court may take judicial notice of these matters, even when not requested to do so; *it is required to notice them if a party requests it and satisfies the requirements of Section 453.*”<sup>75</sup>

Section 453 provides, “The trial court *shall* take judicial notice of any matter specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request,

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<sup>72</sup> Cal. Code Regs. tit. 20, § 13.10.

<sup>73</sup> California Evidence Code § 451.

<sup>74</sup> Cal. Evid. Code § 452 (Deering).

<sup>75</sup> Cal. Evid. Code § 452 (Deering) (Law Revision Commission Comments: 1965–) (*emphasis added*).

through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and  
(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.”  
Cal. Evid. Code § 453 (Deering) (*emphasis added*).

Etheric provided the Commission with notice of its request for notice and has furnished the Commission with sufficient information for the Commission to be able to take judicial notice of NTIA rules for BEAD eligibility, and two orders from the FCC on broadband standards and one of its own decisions (D.22-11-013). Mandatory notice of these four documents was required under Section 451 because they constitute decisional law of the United States or California.

## **2. Etheric’s RDOF Service Area Will Not Be Rendered Ineligible for BEAD**

### **Funds**

The National Telecommunications and Information Administration (“NTIA”) rules for BEAD eligibility qualify for mandatory notice because they constitute decisional law of the United States. In *Boghos v. Certain Underwriters at Lloyd’s of London*, the Supreme Court of California granted the Underwriters request to take judicial notice of additional federal decisions that did not appear in West’s Federal Reporter and Federal Supplement under Evid. Code § 451(a), noting that federal decisions are required to be judicially or official noticed.<sup>76</sup> NTIA is a federal agency that issued a decision relevant to this case regarding the BEAD program.<sup>77</sup> Thus, as federal decisional law, the NTIA decision is required to be officially noticed by the Commission.

Etheric requested official notice of the NTIA Notice of Funding Opportunity (“NOFO”) rules regarding eligibility for BEAD funding. D.22-12-026 expressed concerns that granting Etheric ETC status might “lock out” other funding,<sup>78</sup> such as BEAD, is incorrect. Under the NTIA rules, BEAD

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<sup>76</sup> *Boghos v. Certain Underwriters at Lloyd’s of London*, 36 Cal. 4th 495, 501 n.3 (2005); see also, *Mfrs. Life Ins. Co. v. Superior Court*, 10 Cal. 4th 257, 276 n.9 (1995).

<sup>77</sup> *Boghos v. Certain Underwriters at Lloyd’s of London*, 36 Cal. 4th 495, 501 n.3 (2005).

<sup>78</sup> D.22-12-026, at p.28.

funding is available for areas designated as unserved or underserved on the FCC's broadband map. The BEAD Notice of Funding Opportunity states that an RDOF area would be deemed ineligible for BEAD funding only after the FCC has issued a public notice that it is ready to authorize or has authorized funding. Based on this rule, Etheric's pending RDOF award has not disqualified its RDOF service area from BEAD funding in the FCC's Broadband Map that was issued on Nov. 18, 2022 or any subsequent version of the FCC's broadband map. So long as the Commission continues to consider Etheric's ETC application, the FCC is unable to authorize the RDOF funds, and Etheric's RDOF service area will continue to be eligible for BEAD funding.

Etheric also requests that the Commission take official notice of the BEAD eligibility rules that allow fixed wireless for broadband so long as licensed spectrum is used. The Decision expresses skepticism about Etheric's proposed use of fixed wireless technology. But under the BEAD rules, even if the Commission denies Etheric's ETC designation request in an effort to block fixed wireless technology, BEAD funds may be used for fixed wireless.

In order render a decision that is consistent with, and properly implements, federal law, the Commission should have taken official notice of the BEAD rules issued by NTIA, applied those rules, and determined that granting Etheric's ETC request will not block BEAD funding nor will denying Etheric's ETC request prevent fixed wireless technology from being used to provide broadband in unserved and underserved areas in California.

### **3. Etheric's RDOF Network Meets the FCC's Broadband Speed**

#### **Requirements**

FCC decisions qualify for mandatory notice because they constitute decisional law of the United States. In *Boghos v. Certain Underwriters at Lloyd's of London*, the Supreme Court of California granted the Underwriters request to take judicial notice of additional federal decisions that

did not appear in West's Federal Reporter and Federal Supplement under Evid. Code § 451(a), noting that federal decisions are required to be judicially or official noticed.<sup>79</sup> The FCC is a federal agency that issued decisions governing speed requirements for broadband in RDOF projects.<sup>80</sup> Thus, as federal decisional law, both of the FCC decisions are required to be officially noticed by the Commission.

Etheric requested official notice of the FCC's 2018 and 2019 Connect America Fund orders, which set forth the standards for an applicant such as Etheric to meet to be deemed in compliance. These documents are directly relevant and demonstrate the Decision incorrectly asserts that Etheric's fixed wireless network will not meet the FCC's speed standard for RDOF projects. In the 2018 order, the FCC makes clear that its requirement for 1 Gigabit speeds for broadband does not require 1 Gigabit throughput 100 percent of the time. Rather, the FCC requires that the throughput meet 80 percent of upload and download requirements with 80 percent of the test measurements submitted to the FCC.<sup>81</sup>

We establish a four-level framework that sets forth particular obligations and automatic triggers based on an ETC's degree of compliance with our latency, speed, and, if applicable, MOS testing standards in each state and high-cost support program. We will determine a carrier's compliance for each standard separately. In each case, we will divide the percentage of its measurements meeting the relevant standard by the required percentage of measurements to be in full compliance. . .

For speed, for each speed tier and state we will calculate the percentage of compliance relative to the 80-percent-based standard, so we will divide the percentage of the carrier's testing hours speed measurements at or above 80 percent of the target speed by 80.173 Thus, if a provider observes that 65 percent of its testing hours speed

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<sup>79</sup> *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 501 n.3 (2005); see also, *Mfrs. Life Ins. Co. v. Superior Court*, 10 Cal. 4th 257, 276 n.9 (1995).

<sup>80</sup> *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 501 n.3 (2005).

<sup>81</sup> In the Matter of Connect America Fund, DA 18-710, Adopted July 6, 2018, at ¶61 ("2018 FCC Order"). It can be viewed at <https://docs.fcc.gov/public/attachments/DA-18-710A1.pdf>. Etheric requests official notice of this Order issued by a federal government agency pursuant to Rule 13.10.

measurements meet 80 percent of the required speed, the provider's compliance percentage would be  $65/80 = 81.25$  percent for the relevant speed tier in that state."

The FCC reiterated this standard in the 2019 Order *In the Matter of Connect America Fund*, FCC Order FCC 19-104, Order on Reconsideration.<sup>82</sup>

To achieve full compliance with the latency and speed standards, the Order required that 95% of latency measurements during testing windows fall below 100 milliseconds round-trip time, and that 80% of speed measurements be at 80% of the required network speed. In addition, the Order established a framework of support reductions in the event that a carrier's performance testing did not demonstrate compliance with the speed and latency standards to which each carrier is subject.<sup>83</sup>

Etheric submitted a speed test into the record showing that its first Gigabit network installation in San Juan Bautista, California has speeds of 858.65 Mbps. While that speed test didn't indicate 1 Gigabit, as noted above, the FCC's 2018 Connect America Fund order does not require 1 Gigabit throughput 100 percent of the time. Rather, the FCC requires that the throughput meet 80 percent of upload and download requirements with 80 percent of the test measurements submitted to the FCC. Therefore, the record demonstrates that Etheric's current Gigabit fixed wireless network meets the FCC's requirements.

Even if Etheric's proposed RDOF network were to fall below the FCC's 80/80 rule for 1 Gigabit speed, such potential defect is not grounds to deny Etheric's ETC application. Rather, the FCC rules set forth in the 2018 order state that if a carrier falls below required speeds, the FCC will suspend funding until the carrier remediates the issue causing speed to drop below the requirement of 80 percent of 1 Gig throughput.<sup>84</sup>

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<sup>82</sup> *In the Matter of Connect America Fund*, FCC Order FCC 19-104, Released October 31, 2019.

<sup>83</sup> FCC 2019 Connect America Order, at ¶8.

<sup>84</sup> See 2018 FCC Order at ¶64; See also *In the Matter of Connect America Fund*, FCC Order FCC 19-104, Released October 31, 2019, at ¶8 ("2019 FCC Order"). It can be viewed at <https://docs.fcc.gov/public/attachments/FCC-19-104A1.pdf>. Etheric requests official notice of this

To avoid penalizing a provider for failing to meet multiple standards for the same locations, we adopt a streamlined compliance framework in which the lowest of a carrier's separate latency, speed, and, if applicable, MOS compliance percentages (including percentages for each speed tier) determines its obligations. All carriers not fully compliant in a particular state must submit quarterly reports providing one week of testing hours test results, subject to the same requirements we establish in this Order, and describing steps taken to resolve the compliance gap, and USAC will withhold a percentage of a non-compliant carrier's monthly support. Whenever a carrier in Levels 1 through 3 comes into a higher level of compliance, that level's requirements will apply, and USAC will return the withheld support up to an amount reflecting the difference between the levels' required withholding but not including any support withheld by USAC for more than 12 months.<sup>85</sup>

Similar to commenters' proposals, the framework we adopt resembles the noncompliance framework for interim deployment milestones in section 54.320(d) of the Commission's rules. We emphasize that the goal of this compliance framework is to provide incentives, rather than penalize. Balancing commenters' concerns regarding the severity or leniency of a such a framework, we conclude that our framework appropriately encourages carriers to come into full compliance and offer, in areas requiring high-cost support, broadband service meeting standards consistent with what consumers typically experience.<sup>86</sup>

#### **4. Decision No. 22-11-013 Establishes Etheric's Cost Estimate is Reasonable**

A decision from the California Public Utilities Commission as a constitutional agency of the State of California constitutes decisional law and qualifies for mandatory official notice under Section 451.<sup>87</sup> In *Chaplin v. State Pers. Bd.*, the California First District Court of Appeal took judicial notice of a decision from the State Personnel Board that denied firefighters' motions to dismiss that case. The appeals court held that the trial court should have taken judicial notice of the agency decision, noting "[A] reviewing court shall judicially notice each matter [the] trial court was

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Decision issued by a federal government agency pursuant to Rule 13.10.

<sup>85</sup> 2018 FCC Order, at ¶63.

<sup>86</sup> 2018 FCC Order, at ¶65.

<sup>87</sup> *Chaplin v. State Pers. Bd.*, 54 Cal. App. 5th 1104, 1122 n.5 (2020).

required to notice under Evid. Code, § 451.”<sup>88</sup> Here, the Commission’s decision is similar to the agency decision at issue in *Chaplin*. Thus, the Commission’s own decision qualifies as requiring mandatory official notice because it is decisional law of the State of California.

As discussed above, Etheric requested official notice of Decision No. 22-11-013, approved on Nov. 17, 2022. In that decision, the Commission established that \$4,500 per household or less is a reasonable cost for fixed wireless broadband service based on “actual past project costs”.<sup>89</sup> The per-household cost is so uncontroversial that D.22-11-013 delegates authority to staff to approve CASF projects proposing such per-household cost for fixed wireless projects on a ministerial basis.

The Decision posits that Etheric’s cost estimates for building the RDOF network are too low. But Etheric’s estimates are in line with the “actual past project costs” for fixed wireless broadband in California. Evidence in Etheric’s cost model that was admitted into the record after the record was reopened on Nov. 4 demonstrates that Etheric’s average cost per household for the fixed wireless portion of its RDOF network is \$3,660. Etheric’s cost is somewhat lower than the Commission’s cap because it is able to leverage its existing fiber network rather than installing a new fiber backbone network for RDOF. Evidence in the record shows that 40 percent of Etheric’s RDOF service area is adjacent to or close by its existing fiber network, therefore, only radio equipment need be added to serve new customers.

Thus, Etheric’s cost estimate is extremely reliable because it is substantially the same as the Commission’s own cost estimate based on actual California fixed wireless projects. The Decision provides no reason why the Etheric’s per-household cost estimate for fixed wireless would differ from the Commission’s actual experience on multiple fixed wireless projects in California. Thus, in

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<sup>88</sup> *Chaplin v. State Pers. Bd.*, 54 Cal. App. 5th 1104, 1122 n.5 (2020) (quoting *In re M.M. (State Personnel Bd. 1995)* SPB Precedential Decision No. 95-01) (citing Evid. Code §§ 451(a) and 459(a)).

<sup>89</sup> D.22-11-013, at p. 38, Appendix A, page A-31, A-32.



order be consistent with its own order establishing the reasonable cost for fixed wireless broadband in California, the Commission must take official notice of D.22-11-013, apply the cost estimate to Etheric's proposed RDOF project, and determine that the funding available to Etheric for the RDOF project is sufficient to cover the cost of construction.

#### **G. Releasing Substantial Edits Two Days Prior to Commission Vote on D.22-12-026**

##### **Does Not Comply With Governance Policies**

Fundamental rules of fairness and due process, as well as the Commission's Strategic Directives, Governance, Process Policies and Commission Staff Linkage Policies require a full and fair review of the entire record. The Commission's directive and policy is intended to "enhance transparency and sound decision-making" because the revised Proposed Decision was not issued four days in advance of the Commission's public agenda meeting. The Commission's Strategic Directives, Governance, Process Policies and Commission Staff Linkage Policies rules require that revisions to a proposed decision incorporating comments "will be distributed no later than four business days before the Commission meeting."<sup>90</sup> The Strategic Directives document goes on to explain that "[f]or a Commission meeting on a Thursday, this means the prior Friday is the distribution deadline."<sup>91</sup> The Commission's Strategic Directives policy commits to a decision-making process that is "impartial, fair, consistent, and transparent, maintains integrity at all levels, and adheres to the law".<sup>92</sup> Yet the Commission issued a second revised proposed decision making multiple substantive changes at 1:38 pm on December 14, 2022, less than a day in advance of the

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<sup>90</sup> <https://www.cpuc.ca.gov/-/media/cpuc-website/transparency/commissioner-committees/finance-and-administration/2021/strategic-directives-and-governance-policies.pdf>, p. 26, Rule 8.b. Updated Feb. 27, 2020.

<sup>91</sup> *Id.*

<sup>92</sup> Strategic Directives, Governance, Process Policies and Commission Staff Linkage Policies, Policy SD-10, at p.13 (Feb. 27, 2020) (available at <https://www.cpuc.ca.gov/-/media/cpuc-website/transparency/commissioner-committees/finance-and-administration/2021/strategic-directives-and-governance-policies.pdf>).

Commission's public agenda meeting. This last-minute issuance of a substantial revision to a proposed decision violates the Commission's own procedural policies and constitutes legal error.

## **V. CONCLUSION**

For all of the foregoing reasons, the denial of Etheric's ETC application in D.22-12-026 is based on legal and factual errors. Rehearing should be granted so that Etheric's ETC application be given a full and fair evaluation. The public interest is not served by denying Etheric's ETC designation because the State of California will lose almost a quarter of a billion dollars to build broadband in unserved areas of California. Chronically unserved Californians will be denied access to broadband services for at least another four years while the Commission attempts to find alternate funding such as from the BEAD program.

Signed and Dated: January 17, 2023 at Walnut Creek, CA.

Respectfully submitted,

A handwritten signature in cursive script, reading "Anita Taff-Rice", written over a horizontal line.

iCommLaw  
Anita Taff-Rice  
1547 Palos Verdes, 298  
Walnut Creek, CA 94597  
Phone: (415) 699-7885  
Facsimile: (925) 274-0988  
Email: [anita@icommlaw.com](mailto:anita@icommlaw.com)  
*Counsel for Etheric Communications, Inc.*

## **SB 960 Compliance – Scoping Memorandum Information [Rule 2.1(c)]**

In accordance with the Rule 2.1(c), Etheric provides the following information:

1. Proposed Category: This Application should be categorized as adjudicatory because it is requesting an appellate review of a Commission order. Thus, the proceeding should be concluded within 12 months.
2. Need for hearing: The matters in this Application for Rehearing, raise legal and factual errors, including that the Commission denied Etheric’s ETC designation request despite the lack of evidence contradicting Etheric’s substantial showing that it is qualified to operate as an ETC in California. Further, Etheric identifies ways in which D.22-12-026 does not comply with state and federal law. In an effort to ensure that its application got a full and fair review, Etheric filed a motion for a hearing so that it could attempt to understand the basis for the Commission’s ETC denial. The motion was not acted upon and instead the Decision includes a generic paragraph denying all pending motions without any analysis. Thus, granting a review of D.22-12-026 including a hearing will provide a full opportunity for consideration of the entire record. At the minimum, Etheric is requesting oral argument because several holdings in D.22-12-026 depart from Commission precedent and are inconsistent with state and federal law.
3. Issues to be considered: Whether the Commission’s denial of Etheric’s request for ETC designation was based on legal or factual error.

4. Proposed Schedule:

Application Filed:	January 17, 2023
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Responses Filed:	February 16, 2023
Hearing:	March 6, 2023
Concurrent Briefs:	March 17, 2023
Final Decision Adopted:	60 days after submission

## APPENDIX A

(Proposed Deletions in Strikethrough Font; Proposed Additions in Bold)

### Findings of Fact

1. Etheric has a minimum of \$100,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.
2. Etheric's financials demonstrate that its cash and assets are sufficient to post deposits which may be required by other telephone carriers should Etheric need to purchase services from other carriers in order to provide services.
3. Etheric has demonstrated that its management personnel possess sufficient experience, knowledge, and technical expertise to operate as a telecommunications provider.
4. Etheric meets the requirements to be treated as a NDIEC exempt from Pub. Util. Code §§ 816-830 and § 851 for the sole purpose of the transfer or encumbrance of utility assets to secure debt.
5. Etheric is eligible for exemption from tariffing requirements provided that Etheric complies with the consumer protection rules adopted in D.13-05-035 and D.98-08-031.
6. Etheric meets the Commission's minimum safety goals and expectations of competitive local exchange carriers.
7. Etheric provided a map of the location of its proposed service territory.
8. Etheric has no information to report under Rule 3.1(i), which requires that

a utility filing an application under Pub. Util. Code § 1001, provide a statement regarding compliance with GO 104-A, Section 2.

9. Etheric provided an estimate of its customer base and customer requirements for the first and fifth year of operation.

10. Pursuant to Rule 11.4, Etheric filed motions for leave to file confidential materials under seal.

11. On February 7, 2020, the FCC adopted the RDOF Order program to build broadband and voice capable networks in rural and unserved/underserved communities.

12. On December 7, 2020, the FCC issued a Public Notice announcing the winning bidders for the RDOF Phase I Auction 904. Etheric is among the 15 bidders that provisionally won RDOF awards in California.

13. Winning RDOF bidders must obtain an ETC designation in the state(s) where they seek support in order to receive federal funding.

14. Etheric's proposed buildout to provide voice and broadband service to 64,463 locations in line with RDOF build requirements is not feasible given the present size of the Etheric service area and its operational, financial, and technical capabilities.

15. Etheric's RDOF award of \$248,634,963 ~~is appears in~~ is insufficient to construct and operate a telecommunications and broadband capable network serving up to 64,463 new locations within the state of California.

16. Granting an ETC designation to Etheric at this time is ~~not~~ in the public interest.

### **Conclusions of Law**

1. Pursuant to Pub. Util. Code § 1001, the Commission has authority to determine whether Etheric has met requirements for issuance of a CPCN to operate as a local exchange carrier.

2. Etheric should be granted a CPCN to provide (i) full facilities-based and resold competitive local exchange services in the service territories of AT&T California, Frontier California, Frontier Communications, Consolidated Communications, (ii) full facilities-based and resold interexchange services in California, (iii) broadband internet and voice-over-internet service\subject to the terms and conditions set forth in the Ordering Paragraphs.

3. Etheric should be allowed to use the Energy Division 21-day CEQA exemption process.

4. Etheric is a telephone corporation and a public utility subject to the Commission's jurisdiction as defined in Pub. Util. Code § 234(a) and § 216(a).

5. Once granted a CPCN, Etheric should be subject to the applicable Commission rules, decisions, GOs, and statutes that pertain to California public utilities.

6. Etheric should be granted an exemption from the requirement to file tariffs at this time.

7. Should Etheric decide to offer services that require a tariff or schedule in

the future, Etheric must submit proposed tariffs and/or user guides to the Communications Division via Tier 2 Advice Letters using the GO 96-B Advice Letter process before initiation of service.

8. Etheric's motions to file its Exhibits F,G,H, I, J, N and V1 to the Application, ~~and~~ Exhibits A, B, C, D and E to its April 19 Response to the March 21, 2021 ALJ Ruling, **Exhibits B, F, H, I and J to Etheric's October 4, 2022 Comments on the Proposed Decision and Exhibit B to its October 13, 2022 Ex Parte Notice** should be granted pursuant to the Ordering Paragraphs herein.

9. **Etheric's November 30, 2022 Motion for Official Notice of Decision D.22-11-103 (establishing the reasonable per-household cost for fixed wireless technology), the official instructions from the National Telecommunications and Information Administration ("NTIA") regarding the Broadband Equity, Access, and Deployment ("BEAD") program, and the FCC's 2018 and 2019 Connect America Fund orders (setting forth broadband standards) should be granted.**

10. Etheric should be granted non-dominant carrier status, subject to Commission rules and regulations as detailed in D.85-01-008 and modified in D.85-07-081 and D.85-11-044.

11. Etheric's request for a limited exemption from Pub. Util. Code § 851 regarding the transfer or encumbrance of utility assets to secure debt should be granted.

12. Etheric should obtain a performance bond of at least \$25,000 in accordance



with D.13-05-035 and submit it to the Commission within five days of accepting CPCN authority.

**13.** The Commission has broad authority to grant or deny requests for designation of ETC status, pursuant to Resolution T-17002, and in accordance with the federal delegation of authority set forth in the Communications Act in 47 U.S.C. § 214.

**14.** The Commission has authority to evaluate whether it is in the public interest to ~~grant~~ **deny** an ETC designation to Etheric after taking into account ~~deficiencies within its existing financial, technical and operational expertise to that would affect Etheric's ability to carry out the RDOF build.~~

**15.** Etheric's request for ETC designation should be ~~granted~~ **denied**.

## **O R D E R**

**IT IS ORDERED** that:

1. A certificate of public convenience and necessity is granted to Etheric Communications, LLC to operate as a non-dominant interexchange carrier and to operate as a competitive local exchange carrier to provide (i) full facilities-based and resold competitive local exchange services in the territories of Pacific Bell Telephone Company d/b/a AT&T California, Frontier California Inc., Citizens Telecommunications Company of California, Inc. d/b/a/ Frontier Communications of California, and Consolidated Communications of California Company, (ii) full facilities-based and resold interexchange services in California, and (iii) broadband internet and voice-over-internet service in California, subject to the terms and conditions in this decision.

2. The request of Etheric Communications, LLC to be designated as an Eligible Telecommunications Carrier is **granted**. ~~denied without prejudice.~~

3. The corporate identification number assigned to Etheric Communications, LLC, U7401C, must be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

4. Etheric Communications, LLC must file, in this docket, a written acceptance of the certificate of public convenience and necessity granted in this proceeding within 30 days of the effective date of this decision. Written acceptance filed in this docket does not reopen the proceeding.

5. The certificate granted by this decision will expire if not exercised within 12 months of the effective date of this decision. If the applicant requires additional time to commence service, applicant must submit a request for an extension of time to comply with a Commission decision by e-mail or letter to the Executive Director at least five business days before the existing date for compliance pursuant to Rule 16.6 of the Commission's Rules of Practice and Procedure.

6. Etheric Communications LLC must notify the Director of the Communications Division of the date that competitive local exchange service is first rendered to the public, no later than five days after service first begins, by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov).

7. Etheric Communications, LLC must obtain a performance bond of at least \$25,000 in accordance with Decision 13-05-035. The performance bond must be a continuous bond (i.e., there is no termination date on the bond) issued by a corporate surety company authorized to transact surety business in California, and the Commission must be listed as the obligee on the bond. Within five days of acceptance of its certificate of public convenience and necessity authority, Etheric Communications, LLC must submit a Tier-1 Advice Letter to the Communications Division, containing a copy of the license holder's executed bond, and submit a Tier-1 Advice Letter annually, but not later than March 31 of each year, with a copy of the executed bond.

8. Etheric Communications, LLC must not allow its performance bond to lapse during any period of its operation. Pursuant to Decision 13-05-035, the Commission may revoke a certificate of public convenience and necessity if a carrier is more than 120 days late in providing the Communications Division a copy of its executed performance bond and the carrier has not been granted an extension of time by the Communications Division.

9. In addition to all the requirements applicable to competitive local exchange carriers and interexchange carriers included in Attachments B, C, and D to this decision, Etheric Communications, LLC is subject to the Consumer Protection Rules contained in General Order (GO)168, and all applicable Commission rules, decisions, GOs, and statutes that pertain to California public utilities.

10. Etheric Communications, LLC must report intrastate revenue and pay the resulting public purpose program surcharges specified in Attachment B monthly, through the Commission's proprietary Telecommunications and User Fee Filing System (TUFFS) even if there are no revenues (\$0) and resulting surcharges to report and remit. Communications Division must issue a compliance directive to Etheric Communications, LLC, providing directions for reporting and remitting surcharges and the User Fee through the TUFFS system.

11. Prior to initiating service, Etheric Communications, LLC must: (a) provide the Commission's Consumer Affairs Branch with the name(s), address(es), e-mail address, and telephone number(s) of its designated contact person(s) for purposes of resolving consumer complaints. This information must be updated if the name(s), address(es), or telephone number(s) change, or at least annually, and (b) must provide the Commission's Communications Division with the name(s), address(es), e-mail address, and telephone number(s) of its designated regulatory/official contact person(s). This information must be provided electronically, using the "Contact Information Request Update" form at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone> under Service Provider Requirements and Programs. This information must be

updated if the name or telephone number changes, or at least annually by June 1 of each calendar year.

12. Etheric Communications, LLC must submit, on a calendar year basis: (a) an affiliate transaction report to the Director of the Communications Division, by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov), in compliance with Decision 93-02-019 using the form contained in Attachment D, and annual report to the Director of the Communications Division, by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov), in compliance with General Order 104-A with the information contained in Attachment C to this decision.

13. The staff of the Commission's Energy Division is authorized to review, process, and act upon Etheric Communication, LLC's requests for a determination that its full facilities-based construction activities are exempt from the requirements of the California Environmental Quality Act.

14. Should Etheric Communications, LLC engage in full facilities-based construction activities and believes that these activities are exempt from California Environmental Quality Act (CEQA), Etheric Communications, LLC shall first apply to the Commission's Energy Division staff for a determination of exemption from CEQA by providing the Commission's Energy Division with:

- a. A detailed description of the proposed project, including:
  - i. Customer(s) to be served;
  - ii. The precise location of the proposed construction project;  
and
  - iii. Regional and local site maps.
- b. A description of the environmental setting, including at a minimum:
  - i. Cultural, historical, and paleontological resources;
  - ii. Biological resources; and
  - iii. Current land use and zoning.
- c. A construction workplan, including:
  - i. Commission Preconstruction Survey Checklist-Archaeological Resources;

- ii. Commission Preconstruction Survey Checklist-Biological Resources;
  - iii. A detailed schedule of construction activities, including site restoration activities;
  - iv. A description of construction/installation techniques;
  - v. A list of other agencies contacted with respect to siting, land use planning, and environmental resource issues, including contact information; and
  - vi. A list of permits required for the proposed project.
- d. A statement of the CEQA exemption(s) claimed to apply to the proposed project; and
  - e. Documentation supporting the finding of exemption from CEQA.
  - f. The Energy Division will then review the submittal and notify Etheric Communications, LLC of either its approval or its denial of the claim for exemption from CEQA review within 21 days from the time that Etheric Communication, LLC's submittal is complete.

15. If the Energy Division approves Etheric Communications, LLC's claimed California Environmental Quality Act (CEQA) exemption(s), the staff shall prepare a Notice to Proceed and file a Notice of Exemption with the State Clearinghouse, Office of Planning and Research. If the Energy Division does not approve the claimed exemption, the staff shall issue to Etheric Communications, LLC a letter which states the specific reasons that the claimed CEQA exemptions do not apply to the proposed project. Upon disapproval, Etheric Communications, LLC shall either re-design the specific project and facilities and then reapply for a finding of exemption from CEQA or file a formal application with the Commission seeking the requisite approval and full CEQA review, before commencing any full facilities-based construction activities.

16. Etheric Communications, LLC is granted an exemption from the requirement to file tariffs at this time. In the future, if Etheric Communications, LLC decides to offer services that require a tariff, such as basic service, Etheric Communications, LLC must submit proposed tariffs and/or user guides to the Communications Division via Tier 2

Advice Letters using the General Order 96-B Advice Letter process 30 days before initiation of service.

17. Etheric Communications, LLC's request for a limited exemption from Public Utilities Code § 851 regarding the transfer or encumbrance of utility assets to secure debt is granted.

18. Etheric Communications, LLC's motions to file under seal its Exhibits F,G,H, I, J, N and V1 to the Application, ~~and~~ Exhibits A, B, C, D and E to its April 19 Response to the March 21, 2021 Administrative Law Judge (ALJ) Ruling, **Exhibits B, F, H, I and J to Etheric's October 4, 2022 Comments on the Proposed Decision and Exhibit B to its October 13, 2022 Ex Parte Notice** are granted for a period of three years after the date of this decision. During this three-year period, this information shall not be publicly disclosed except on further Commission order or ALJ ruling. If Etheric Communications, LLC believes that it is necessary for this information to remain under seal for longer than three years, it may file a new motion showing good cause for extending this order by no later than 30 days before the expiration of this order.

19. ~~All motions which have not been ruled upon prior to this decision are deemed denied.~~ **Etheric's November 30, 2022 Motion for Official Notice of Decision D.22-11-103 (establishing the reasonable per-household cost for fixed wireless technology), the official instructions from the National Telecommunications and Information Administration ("NTIA") regarding the Broadband Equity, Access, and Deployment ("BEAD") program, and the FCC's 2018 and 2019 Connect America Fund orders (setting forth broadband standards) should be granted.**

Application 21-01-002 is closed.

This order is effective today.

Dated December 15, 2022, at San Francisco, California.